ATTORNEY FOR APPELLANT:

ROBERT N. REIMONDO
Capper Tulley & Reimond
Crawfordsville, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General Of Indiana

RYAN D. JOHANNINGSMEIER
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

BRANDON A. CROCKETT,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 86A05-0601-CR-16
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE WARREN CIRCUIT COURT
The Honorable John A. Rader, Judge
Cause No. 86C01-0504-FB-27

August 31, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Brandon Crockett was found guilty following a jury trial of burglary as a Class B felony and was also found to be an habitual offender. The trial court sentenced Crockett to thirty years. Crockett now appeals his burglary conviction arguing that he received ineffective assistance from his trial counsel, that the prosecutor committed misconduct, and that the State did not present sufficient evidence to support his conviction. We conclude that Crockett did not receive ineffective assistance from his counsel, that the prosecutor did not commit misconduct, and that there was sufficient evidence to support his conviction for burglary. Therefore, Crockett's conviction for burglary as a Class B felony is affirmed.

Facts and Procedural History

On the night of Friday, April 15, 2005, Ronald Chastain was at home with his girlfriend Cindy Furr in Williamsport, Indiana. That evening, Crockett and another man only identified as "Chris" came to Chastain's home. Chastain had met Crockett on two prior occasions, but did not know Chris. Crockett told Chastain that his car had broken down, and Chastain let Crockett and Chris come inside. The group talked for a while and drank a few beers. Chris eventually left saying that he knew someone who lived in the neighborhood who could give him and Crockett a ride. Thirty minutes later, Chastain told Crockett to leave because he and Furr were going to bed. Chastain locked the front door after Crockett left. The front door had a "doggy door" for Chastain's dog that was made of a plastic frame with a flapping rubber mat. Chastain secured the doggy door by sliding a plastic cover into its frame, which then made the door a solid door. Chastain took his watch off and placed it by

the lamp in the living room. He left the lamp on in case Furr got up in the middle of the night.

Sometime around five a.m. on Saturday morning, Furr woke up when she heard a noise and saw the light in the living room go off. She woke Chastain up, and the two went to the living room where they saw Crockett crouching behind a foosball table. Chastain noticed that the doggy door had been broken off the door and was lying on the floor. Chastain asked Crockett why he was inside the house, and Chastain testified that Crockett "started babbling some nonsense." Transcript at 38. Furr called the police, while Chastain escorted Crockett to the door and told him to wait outside. Once outside, Crockett fled on foot.

The police arrived shortly thereafter. Chastain informed them that his watch that he left in the living room was missing. Chastain and Furr were both later shown photographic arrays and identified Crockett as the man who entered the house. The State charged Crockett with burglary as a Class B felony, theft as a Class D felony, and with being an habitual offender. With regard to the theft charge, the State specifically alleged that Crockett stole "a wallet containing one hundred sixty dollars ($160.00) in cash, several credit cards and a watch . . . ." Appendix of the Appellant at 6.

Crockett's jury trial began on October 25, 2005. Immediately before the trial began, Crockett's counsel made an oral motion in limine asking the court, pursuant to Indiana Evidence Rule 404(b), to bar any evidence of uncharged acts involving Crockett. The trial court granted this motion. Chastain and Furr both testified at the trial. During Chastain's testimony, the following exchange took place:

Q When you saw [Crockett] standing there, or crouching there, what happened next?
A I started asking him what he was doing in my house and he started babbling some nonsense. I was half asleep . . . not making sense, and . . .
Q Do you recall the gist of what he was saying to you?
A Yeah, basically he said that I needed to hide him from the police because we'd raped a girl.
Q He said "we raped a girl"?[sic]
A Yeah. I said "who we", [sic] and he said "me and you". [sic] I like, I've been in bed man. And he kept on babbling, and I kept telling him to get out.

Tr. at 38-39. Crockett's counsel raised no objection to this testimony. The prosecutor also asked Furr whether Crockett said anything when she and Chastain found him in the living room, and Furr testified as follows:

> He just mumbled off, saying something that the cops were after him and [Chastain], for raping somebody that night. And I go "[Chastain] couldn't have done it; he was with me all night". [sic] So, I don't know what was going on. He was just mumbling it off.

Id. at 66. Crockett's counsel did not object to this testimony. The jury ultimately acquitted Crockett of the theft charge, but convicted him of burglary as a Class B felony and found that he was an habitual offender. The trial court sentenced Crockett to ten years for his burglary conviction and enhanced that sentence by twenty years because of his habitual offender status. This appeal ensued.

Discussion and Decision

I. Ineffective Assistance of Trial Counsel

Crockett first argues that he received ineffective assistance from his trial counsel. We review claims of ineffective assistance of trial counsel under the two-part test set forth in

Strickland v. Washington, 466 U.S. 668 (1984). Sharp v. State, 835 N.E.2d 1079, 1086 (Ind. Ct. App. 2005). First, the appellant must show that counsel's performance was deficient. Id. "This requires a showing that counsel's representation fell below an objective standard of reasonableness, and that the errors were so serious that they resulted in a denial of the right to counsel guaranteed to the defendant by the Sixth and Fourteenth Amendments." Id. (citation omitted). Second, the appellant must show that the deficient performance of his counsel resulted in prejudice. Id. Prejudice is established by showing that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. In order to prevail on a claim of ineffective assistance of counsel because of a failure to object, a defendant must prove that an objection would have been sustained if made and that he was prejudiced by the failure. Id.

Before trial, Crockett's counsel made an oral motion in limine requesting that the trial court bar, pursuant to Evidence Rule 404(b), any evidence of uncharged acts involving Crockett. The trial court granted this motion. During trial, however, Chastain and Furr both testified that when they encountered Crockett in the living room and asked him why he was there, he said that the police were after him because he and Chastain had raped someone. Crockett's counsel did not object to Chastain's or Furr's testimony. Crockett argues that Chastain's and Furr's testimony was inadmissible character evidence under Evidence Rule 404(b), and that his counsel's failure to object to this testimony constituted ineffective assistance of counsel.

Evidence Rule 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." The rationale underlying Evidence Rule 404(b) is that the jury is precluded from making the "forbidden inference" that the defendant has a criminal propensity and therefore committed the charged conduct. Gillespie v. State, 832 N.E.2d 1112, 1117 (Ind. Ct. App. 2005). In deciding whether the challenged evidence is admissible pursuant to Evidence Rule 404(b), we: (1) determine whether the evidence of other crimes, wrongs, or acts is relevant to a matter at issue other than the defendant's propensity to commit the charged act; and (2) balance the probative value of the evidence against its prejudicial effect pursuant to Evidence Rule 403. Id. If the evidence bears on some issue other than criminal propensity and clears the balancing hurdle of Evidence Rule 403, it is admissible. Id.

Crockett's ineffective assistance of counsel claim fails because any objection made by his counsel to Chastain's and Furr's testimony would not have been sustained. Chastain's and Furr's testimony about Crockett's statement that the police were after him because he and Chastain raped someone is not evidence of other crimes, wrongs, or acts offered to prove Crockett's character "in order to show action in conformity therewith." Ind. Evid. R. 404(b). The testimony was used by the State to show the excuse Crockett gave for being in Chastain's house, not to show that he committed a rape. Chastain's and Furr's testimony was relevant because it established that Crockett did not have a legitimate reason for being in Chastain's house. Any prejudice caused by the testimony was minimal because Chastain and Furr both testified that Crockett's statement was false because Chastain had been asleep in

bed with Furr the entire night. Therefore, Crockett did not receive ineffective assistance from his trial counsel.

II. Prosecutorial Misconduct

Crockett next argues that the prosecutor committed prosecutorial misconduct by eliciting testimony from Chastain and Furr that Crockett said the police were after him because he and Chastain raped someone. Crockett contends that this constituted misconduct because Chastain's and Furr's testimony was inadmissible character evidence under Evidence Rule 404(b).

The State argues that Crockett has waived this issue by failing to object at trial. "A defendant waives appellate review of the issue of prosecutorial misconduct when he fails to immediately object, request an admonishment, and then move for mistrial." Reynolds v. State, 797 N.E.2d 864, 868 (Ind. Ct. App. 2003). Crockett did not object to the testimony the prosecutor elicited from Chastain and Furr. Nor did he request an admonishment or move for a mistrial. Therefore, Crockett has waived this issue.

To avoid waiver, Crockett argues that the prosecutor's actions constituted fundamental error. Our supreme court has previously held that a claim of prosecutorial misconduct presented on appeal in the absence of a contemporaneous trial objection will not succeed unless the defendant establishes not only the grounds for prosecutorial misconduct but also the additional grounds for fundamental error. Booher v. State, 773 N.E.2d 814, 818 (Ind. 2002). For prosecutorial misconduct to constitute fundamental error, it must make a fair trial impossible or constitute clearly blatant violations of basic elementary principles of due

process and present an undeniable and substantial potential for harm. Benson v. State, 762 N.E.2d 748, 756 (Ind. 2002).

When we review a claim of prosecutorial misconduct, we determine: (1) whether the prosecutor engaged in misconduct; and (2) whether that misconduct, under all of the circumstances, placed the defendant in a position of grave peril to which he should not have been subjected. Donnegan v. State, 809 N.E.2d 966, 972 (Ind. Ct. App. 2004), trans. denied. Whether the prosecutor has placed the defendant in a position of grave peril is measured by the probable persuasive effect of any misconduct on the jury's decision, and whether there were repeated instances of misconduct that would evidence a deliberate attempt to improperly prejudice the defendant. Oldham v. State, 779 N.E.2d 1162, 1175 (Ind. Ct. App. 2002), trans. denied.

We have already determined that Chastain's and Furr's testimony was not evidence of other crimes, wrongs, or acts introduced to prove Crockett's character in order to show action in conformity therewith, and thus, was not inadmissible under Evidence Rule 404(b). Because Chastain's and Furr's testimony was not character evidence under Evidence Rule 404(b), the prosecutor did not engage in misconduct when he elicited this testimony.

Even if the prosecutor engaged in misconduct, it did not place Crockett in a position of grave peril. Chastain and Furr both testified that Crockett's statement was false because Chastain was with Furr all night. The probable persuasive effect of this testimony on the jury was likely negligible. Crockett cannot show that the prosecutor's actions constituted fundamental error. Therefore, Crockett's prosecutorial misconduct claim fails.

III. Sufficiency of the Evidence

Crockett argues that the State did not present sufficient evidence to support his conviction for burglary as a Class B felony. When we review sufficiency of the evidence claims, we do not reweigh the evidence or assess the credibility of the witnesses. Buntin v. State, 838 N.E.2d 1187, 1189 (Ind. Ct. App. 2005). We consider only the evidence most favorable to the judgment, together with all reasonable and logical inferences to be drawn therefrom. Id. We will affirm a conviction where there is substantial evidence of probative value to support it. Id. "A judgment based on circumstantial evidence will be sustained if the circumstantial evidence alone supports a reasonable inference of guilt." Id. at 1189-90.

In order to prove that Crockett committed burglary as a Class B felony, the State was required to prove that Crockett broke and entered the dwelling of Chastain with the intent to commit a felony in it. Ind. Code § 35-43-2-1. Crockett concedes that the State established that he was in the home of Chastain, but he argues that the State did not prove that he had the intent to commit a felony. As support for his position, Crockett asserts that the jury did not believe that he stole any of Chastain's possessions because it acquitted him of the charge of theft.

Initially, we note that Crockett's acquittal on the charge of theft does not preclude the jury from finding him guilty of burglary. The theft charge filed against Crockett alleged that he stole a wallet, containing credit cards and cash, and a watch. Chastain's testimony at trial only indicated that his watch was stolen. It is possible that the jury found that Crockett stole Chastain's watch, but acquitted Crockett of the theft charge because there was no evidence

that the wallet was also stolen.

Here, the record reveals that Crockett entered the house by breaking the doggy door off the front door. Upon entering the living room, he turned the lamp off. When they entered the living room, Chastain and Furr found Crockett crouching behind a foosball table. Chastain asked Crockett why he was inside the house, and Crockett made up a false excuse saying the police were after him because he and Chastain raped someone. After Chastain escorted Crockett out, knowing that Furr was calling the police, Crockett fled the scene. When the police arrived, Chastain determined that the watch he left by the lamp in the living room was missing. The evidence introduced was sufficient to permit the jury to reasonably infer that upon entering Chastain's home, Crockett intended to commit theft. Therefore, the State presented sufficient evidence to support Crockett's conviction for burglary as a Class B felony.

Conclusion

Crockett did not receive ineffective assistance from his trial counsel. The prosecutor did not commit misconduct when he elicited certain testimony from Chastain and Furr. The State presented sufficient evidence to support Crockett's conviction for burglary as a Class B felony.

Affirmed.

SHARPNACK, J., and NAJAM, J., concur.